IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of the Case

Criminal Appeal No. 521 of 2001

Makkhan Singh vs. State

Date of Decision :- 27/3/2006

~~**A.F.R. (Approved for Reporting)**~~

Not approved for reporting

Date :- 27/3/06 Initials of Judge.

Note :- Bencher Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

CRIMINAL APPEAL NO.521 OF 2001
(Old No. 3448 of 1984)

1. Prem Singh s/o Sri Chandra Singh
   District Pithoragarh
2. Dilip Singh
   S/o Jagat Singh
   District Pithoragarh
3. Trilok Singh S/o Bhim Singh
   District Pithoragarh .....Appellants

Versus

State of Uttaranchal .....Respondent

Date :- 27th March, 2006

Mr. B.S. Adhikari learned counsel for the appellants
Sri A. Rab learned Addl.G.A.

Hon'ble J. C. S. Rawat, J.

1. This is a criminal appeal against the judgment and order dated 12.12.1984 passed by Sri R. N. Sinha, the then Sessions Judge, Pithoragarh in S.T. No.9/1983, whereby the appellants were convicted and sentenced to undergo R.I. for a period of five years under section 366 I.P.C.

2) Brief facts of the prosecution case are that an FIR was lodged in the police station by Sri D.C.S. Rawat-S.I. alleging therein that the prosecutrix aged about 18 years belonged to Nepal. On 12.9.1982 the prosecutrix was going towards Jhulaghat from her village Sagri, Nepal. She was travelling on 12.9.1982 towards the house of her relatives at Dharchula from Jhulaghat in a bus in which the accused persons were also travelling alongwith other passengers. During the journey, the accused persons succeeded to get familiar with the prosecutrix. The accused persons told her that she would not get any accommodation in the night in Pithoragarh and thus she would have to face difficulties in getting the accommodation. She was enticed by the

appellants. The lady got down from the bus at Dharchula alongwith the accused persons in the night. The appellants took her in a hotel i.e. Raja Hotel and booked a room for stay. The prosecutrix protested to stay in the room alongwith the appellants. On this, one of the appellant Prem Singh took out his revolver and threatened her with the dire consequences. Thereafter, the two appellants, namely Prem Singh and Dilip Singh committed the rape upon her. As soon as the appellant Trilok Singh was ready to commit the rape, the police party headed by D. C. S. Rawat, S.I. reached at the spot alongwith Arjun Singh. The police had brought two witnesses namely Habib Ullah (PW4) and Savir Hussain. The prosecutrix narrated the entire story as mentioned above. The police party took the appellants as well as the prosecutrix into custody. Thereafter, the prosecutrix was sent for medical examination. The investigation was taken up as usual which culminated into the submission of the chargesheet. After submission of chargesheet the accused were committed to the Court of Sessions for trail and the trial court framed charges against the accused persons. The accused persons denied charges levelled against them and claimed the trial.

3) The prosecution in order to support its case examined as many as five witnesses. Sher Singh (P.W.1) was the servant in the Raja Hotel. Ramesh Chand (PW2) was a formal witness of the police party. Argun Singh (PW3) was the Sub Inspector, who proved the factum of recovery of accused persons and the prosecutrix in the room of Hotel Raja. Habi Ullah (PW4) is the witness of recovery of accused persons and the prosecutrix. Suresh Chandra Saxena was the

Investigating Officer of this case and he submitted the chargesheet against the appellants. It is pertinent to mention here that the prosecutrix was not produced before the court as a witness in this case.

4. In the statement recorded u/s 313 Cr.P.C. the accused persons denied the prosecution case and stated that they have been falsely implicated in this case.

5. The learned trial court after appraisal of the evidence on record, the appellant was convicted and sentenced as mentioned above.

6. I have heard the learned counsel for the parties and perused the evidence on record.

7. Learned counsel for the appellants contended that the prosecution has failed to prove the charge against the appellants and as such they are entitled to be acquitted. The prosecution has adduced the evidence of Sher Singh, who had stated that the appellants and the prosecutrix took a room. He further stated that he entered into the room, where the customers were staying, at the behest of the police party. He was declared hostile by the prosecution. The trial court has held that the prosecution should not have declared the witness hostile because he had stated that he saw the prosecturix alongwith the appellants in the room.

8. Perusal of the statement of Sher Singh PW1 recorded under section 161 Cr.P.C. Ex.ka.9 reveals that the prosecutrix had stated the entire story to the police, who narrated the incident in the FIR in presence

of witness. But, during his evidence he had not supported the version of the statement recorded under section 161 Cr.P.C. The witness was rightly cross examined by the prosecution. Whereas the testimony of the witnesses are concerned, Arjun Singh (PW3) was the S.I. in the police station. He received a telephonic information that some people were staying in a hotel alongwith a woman in a suspicious condition. After receiving the information, the police party headed by D.C.S.Rawat reached at the spot and they got opened the door of the room and found the appellants staying in the room alongwith the prosecutrix. Habib Ullah (PW4) is said to have been an independent witness. When he was going to his house the police party took him to be the witness of recover. The trial court has given a finding that the prosecutrix was recovered alongwith the appellants in a room, as such, a presumption could be drawn that she has been kept there with ulterior motive and it could be presumed that the rape was committed upon her. The trial court had observed that the prosecution witnesses had deposed before the court that when the witnesses reached at the room of hotel the prosecutrix narrated the entire soty as indicated above to them and this evidence of prosecution witnesses is relevant under section 8 of the Indian Evidence Act. However, the prosecutrix did not appear before the court below and she never supported her statement by giving evidence before the court. The prosecutrix was medically examined and the report of the medical examination is on record which is Ex.ka.11. The Medical Officer had given the opinion that there was no sign of recent sexual intercourse and the prosecutrix was habitual of sexual intercourse. It was further opined that the

prosecutrix was more than 16 years of age at time of occurrence. It is also evident from the record that there was no sign of recent sexual intercourse on her person and she was not below the age of 17 years.

9. To prove the charge under section 366 IPC, it has to be proved that the girl has been kidnapped or abducted or induced to compel her for illicit intercourse. For the sake of convenience, section 366 IPC provides as under:

> ***"366. Kidnapping, abducting or inducing woman to compel her marriage, etc.*** *– Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to then years, and shall also be liable to fine ......"*

10. In absence of the evidence of the prosecutrix the offence cannot be proved against the appellants. Moreover, the prosecutrix has not reported the matter to the police station. It is very strange that the girl was not produced before the court below. In absence of such evidence, the offence of kidnapping or abducting or enticing a woman to compel her for illicit intercourse or marriage etc. cannot be held to be proved. In the instant case, there was no evidence with regard to the illicit intercourse. In absence of such

finding, the appellants cannot be convicted. The trial court erred in holding that the presumption can be drawn that the prosecutrix had been abducted or kidnapped. The trial court should have relied upon the legal evidence produced before this court below and he should not have convicted the appellants on the basis of surmises and presumptions. The trial court had convicted the appellants without considering the legal evidence produced before the court below. The trial court had passed the conviction on the basis of philosophy which had been incorporated in the impugned judgment. It is well settled position of law that the prosecution should have proved the case beyond reasonable doubt and if there is no legal evidence on record the accused cannot be convicted. In view of the above, I can very well hold that there is no evidence with regard to the offence under section 366 IPC.

11. In view of the above discussion, I am of the view that the prosecution has not established the guilt beyond reasonable doubt against the appellants. I find that the learned trial court has erred in convicting and sentencing the appellant. Hence, the appeal is allowed and the conviction and sentence against the appellants awarded by the trial court are set aside. The appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.

12. Let the lower court record be sent back to the court concerned.

(J.C.S. RAWAT, J.)

Dated 27.03.2006
LSR